Supreme Court, U. S.
FILED
NOV 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. ~~79~~ 79-846

Robert Bramscher, Trustee in Bankruptcy
of Kurt W. Zahn a/k/a Kurt Walker Zahn
a/k/a Curt Zahn a/k/a Kurt A. Zahn and
Anna Zahn a/k/a Ann Zahn,
Petitioners,

-vs-

Kurt W. Zahn a/k/a Kurt Walker Zahn
a/k/a Curt Zahn a/k/a Kurt A. Zahn &
Anna Zahn a/k/a Ann Zahn,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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October Term, 1979
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Robert Bramscher, Trustee in Bankruptcy of Kurt W. Zahn a/k/a Kurt Walker Zahn a/k/a Curt Zahn a/k/a Kurt A. Zahn and Anna Zahn a/k/a Ann Zahn,
Petitioners,

-vs-

Kurt W. Zahn a/k/a Kurt Walker Zahn a/k/a Curt Zahn a/k/a Kurt A. Zahn & Anna Zahn a/k/a Ann Zahn,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert Bramscher, Trustee in Bankruptcy, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above-entitled case on August 20, 1979.

OPINIONS BELOW

The opinion of the Bankruptcy Court of the United States District Court for the Eastern District of Wisconsin is reported at 2 Bankruptcy Court Decisions, 1609, and is printed in Appendix A hereto, infra. page 1a. The opinion of the District Court for the Eastern District of Wisconsin is reported at 4 Bankruptcy Court Decisions 501 and is printed in Appendix A hereto, infra., page 16a. The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported, and is printed in Appendix A hereto infra., page 20a, The journal entry of judgment of the United States Court of Appeals for the Seventh Circuit is printed in Appendix A hereto, infra., page 23a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was made and entered on August 20, 1979. (Appendix A, infra., page 23a.) The jurisdiction of this Court is invoked under Section 24 (c) of the Bankruptcy Act formally cited at Title 11 U.S.C. 47 (c) and under Title 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

On March 12, 1974, the Wisconsin Statutory (Section 272.20 of the Wisconsin Statutes*) limit on homestead exemptions was increased from $10,000 to $25,000. On November 20, 1975, the bankrupts filed their petitions in bankruptcy. Kurt Zahn's schedules listed 38 creditors at $52,477.27, of which 37 creditors

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*Section 272.20 of the Wisconsin Statutes was renumbered by the Supreme Court pursuant to an Order dated January 1, 1976, from Section 272.20 to Section 815.20. See 67 Wis. 2d 761 (1975).

totalling $52,377.27 were incurred prior to March 12, 1974. Anna Zahn's schedules listed three creditors at $2,234.34, all of which were incurred prior to March 12, 1974.

The bankrupts listed a farm in Palmyra, Wisconsin, as their homestead, claiming a $25,000 homestead exemption. The Trustees Report of Exempt Property declined to set aside a homestead exemption in excess of $10,000, the statutory limit prior to March 12, 1974. The bankrupts objected to the Trustee's Report, a trial was held and the Bankruptcy Judge rendered a decision in favor of the bankrupts. The United States District Court for the Eastern District of Wisconsin affirmed. The Court of Appeals for the Seventh Circuit affirmed. The questions presented are:

A. Can a Trustee in Bankruptcy assert the rights and claims of actual creditors of the bankrupt under Section 70 (c), formerly 11 U.S.C. Section 110 (c), challenging the amendment of the Wisconsin Homestead Limitation increasing same from $10,000 to $25,000, thereby impairing obligations created by contract in contravention of Article I, Section 10 of the United States Constitution?

B. Did the Courts below err in holding that the bankrupts were entitled to a homestead exemption of $25,000, which was the exemption amount in effect on the date their petitions in bankruptcy were filed?

CONSTITUTIONAL PROVISIONS, STATUTES, NATIONAL BANKRUPTCY ACT AND RULES

The pertinent section of the United States Constitution is Article I Section 10 that prohibits

States from passing laws that impair contractual obligations. The Wisconsin Statutes Section 272.20 sets forth the statutory exemption for a homestead. The effects of the Bankruptcy Act on exemptions is Section 6 of the National Bankruptcy Act (formerly 11 U.S.C. Section 24) and Section 47 (6) of the National Bankruptcy Act (former 11 U.S.C. Section 75) prescribes the Trustee's duty on setting aside claimed exemptions. Section 70 of the National Bankruptcy Act describes title to property in a bankruptcy proceeding (former 11 U.S.C. Section 110). Rule 403 of Bankruptcy Procedure covers exemptions. These provisions of law are set forth in Appendix B pages 28a to 29a.

STATEMENT

The bankrupts filed their petitions in bankruptcy on the 20th day of November, 1975. They listed a parcel of real estate located in the Town of Palmyra, Jefferson County, State of Wisconsin, consisting of approximately 248.4 acres of land and improvements, valued at $141,000.00. The bankrupts claimed said real estate as their homestead and under Section 272.20 Wis. Stats. (1974),/[1] claimed a statutory exemption of $25,000.00.

The Trustee filed his Report of Exempt Property declining to set aside any sum exempt under the homestead provisions of the Wisconsin Statutes in excess of $10,000.00, the statutory limit under Section 272.20 of the Wisconsin Statutes as of March 12, 1974. The Trustee declined to allow any greater sum based upon Article I Section 10 of the United States

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/[1]Section 272.20 was renumbered by Supreme Court Order effective January 1, 1976, to Section 815.20. See 67 Wis. 2d 761 (1975).

Constitution in that to grant a higher exemption would be an impairment of contract because substantially all of the bankrupts' debts as set forth in their schedules were incurred prior to March 12, 1974, the date of amendment of Section 272.20 increasing the homestead allowance from $10,000 to $25,000.

The bankrupts objected to the Trustee's Report of Exempt Property. The matter was tried to the Bankruptcy Court (transcript). The Bankruptcy Judge rendered his decision (Appendix A, pages 1a to 15a) sustaining the bankrupts' objection. The Trustee appealed the decision to the District Court, who affirmed the Bankruptcy Judge (Appendix A, pages 16a to 19a.) The Trustee appealed to the Seventh Circuit Court of Appeals, who affirmed the District Court (Appendix A, pages 20a to 22a).

The farm was sold in the bankruptcy proceedings upon notice to all parties and from the proceeds, the bankrupts were paid the $10,000 homestead allowance as provided in Section 272.20 of the Wisconsin Statutes prior to the amendment of March 12, 1974. The balance of the claimed homestead exemption is being held by the Trustee pending a final determination.

The Schedules of Kurt Zahn (exhibit 7) reveal thirty-eight (38) creditors in the total indebtedness of $52,477.27. Pursuant to demand, Kurt Zahn made his schedules more definite and certain (exhibit 8), which revealed that only one creditor, No. 18, Palmer & Dunbar, Inc., in the sum of $100, was incurred subsequent to March 12, 1974.

The Schedules of Anna Zahn (exhibit 10) reveal three creditors in the total indebtedness of $2,234.34. At the trial it was disclosed that one of the creditors, Wickes Lumber & Building Supplies, Inc., (exhibit 1) was paid in full prior to bankruptcy, leaving in fact only two creditors of Anna Zahn at the time of the

filing of the petition in these proceedings in the total sum of $1,780.60. Pursuant to demand, Anna Zahn made her schedules more definite and certain (exhibit 11) which revealed that all of her creditors' claims were incurred prior to March 12, 1974.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, in adopting the Bankruptcy Judge's decision, held that the duty of a Trustee was to set off exemptions which exist as to creditors generally on the date the petition in bankruptcy was filed. This decision is in conflict with a decision of another Court of Appeals on the question of whether a Trustee can assert the rights of creditors of the bankrupt under Section 70 (c) of the National Bankruptcy Act claiming the creditors' rights have been impaired in violation of Article I, Section 10 of the United States Constitution. Throughout these proceedings and appeals, the primary position of the Trustee has been that the Bankruptcy Court is not administering exempt property in contravention of *Lockwood vs. Exchange Bank,* 190 U.S. 294 (1902). The Court of Appeals, in adopting the Bankruptcy Judge's decision, failed to meet head on the constitutional issue presented under Article I, Section 10 of the U.S. Constitution. Once a creditor's contract is substantially impaired, then the constitutional prohibition comes into play. *Edwards vs. Kearzey,* 96 U.S. 595 (1877); *W.B. Worthen Co. v. Thomas,* 292 U.S. 426 (1934); and *Ohio Casualty Ins. Co. v. Holz & Holz, Inc.,* 24 Wis. 2d 587 (1964).

The Wisconsin Legislature, by Chapter 168, Section 1, *Laws of 1973,* which became effective on March 12, 1974, amended Section 272.20 (1) of the Wisconsin Statutes on homesteads by increasing the homestead exemption from $10,000 to $25,000. This amendment impairs the right of contract to all

creditors that were in existence prior thereto. Substantially all of the creditors of the bankrupts stand in an ideal position in that the increase in the homestead exemption would not apply to them. The Trustee, standing in the shoes of the bankrupt and the overshoes of the creditors *Schneider vs. O'Neill,* 243 F. 2d 914 (8th Cir. 1957) can assert these creditor's rights under Section 70 (c) of the National Bankruptcy Act for the benefit of the entire estate. *Lewis vs. Manufacturers National Bank,* 364 U.S. 603 (1961). For all creditors whose claims were in existence prior to March 12, 1974, the statutory homestead increase did not apply to them and therefore this increase from $10,000 to $25,000 was in fact not exempt as to them. The Trustee, in pursuing these creditor's rights and since the property was not exempt to them, it follows that it would not be exempt to the Trustee and therefore he would not be administering exempt property in violation of *Lockwood vs. Exchange National Bank,* supra.

The Court of Appeals decision, if permitted to stand, would be in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *England vs. Sanderson* (9th Cir., 236 F. 2d 641). The Court of Appeals, in adopting the Bankruptcy Judge's decision, placed too narrow a construction on Section 6 of the National Bankruptcy Act. The Bankruptcy Judge's Decision on pages 2 and 3 sets forth:

> "The basic direction to a trustee in bankruptcy may be found in Section 6 of the Bankruptcy Act which provides in part:
>
> > This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by *the State laws in force at the time of the filing of the petition* ... (Italics ours.)"

Section 6 of the National Bankruptcy Act allows the use of State homestead exemptions to bankrupts. However, they still retain their state oriented character. Under Wisconsin law, *Ohio Casualty Ins. Co. vs. Holz & Holz, Inc.,* 24 Wis. 2d 587 (1964), the property is not exempt to pre-existing creditors and that should be the same application under Section 6 of the National Bankruptcy Act. In Re: *Swendor,* CCH Bankruptcy, para. 66,860. In Re: *Northrop,* CCH Bankruptcy, para. 66,523.

Although *Lockwood vs. Exchange National Bank,* supra, has not been overruled, Congress, by the recent enactment of the Bankruptcy Reform Act of 1978, effectively overruled the holding of that case. Under Title 11 U.S.C. Section 541, all property of a realizable value including exempt property becomes property of the bankrupt estate. See House Report No. 95-595, page 175:

> "The bill makes significant changes in what constitutes property of the estate. Current law is a complicated melange of references to State law, and does little to further the bankruptcy policy of distribution of the debtor's property to his creditor in satisfaction of his debts. The Bankruptcy Commission explored the subject and the need for change in depth, and it is not necessary to repeat that discussion here."

Also see: House Report No. 95-595, page 368:

> "Paragraph (1) has the effect of overruling *Lockwood v. Exchange Bank,* 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start,. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate. The broad jurisdictional grant in proposed 28 U.S.C. 1471 (b) would have the effect of overruling *Lockwood* independently of the change made by this provision."

Therefore, under the circumstances and to do equity to the creditors so they can share in what rightfully belongs to them, it is respectfully submitted that the lower courts rulings are in error.

CONCLUSION

For the reasons as above stated, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IN THE MATTERS OF	IN BANKRUPTCY
KURT W. ZAHN and	No. 75-2620
ANNA ZAHN,	No. 75-2621
Bankrupts.	

DECISION

Kurt W. Zahn and his wife, Anna Zahn, filed bankruptcy on November 20, 1975. They owned a farm valued at $141,000 which was their homestead. Although the bankrupts did not appear to have very much equity in the farm, the trustee in bankruptcy was able to sell the farm free and clear of liens so that he has in excess of $25,000 on hand. The bankrupts claim a homestead exemption in the amount of $25,000 pursuant to Section 272.20 of the Wisconsin Statutes. This Statute was amended on March 12, 1974 to increase the homestead exemption from $10,000 to $25,000. The Statute also provides that where a husband and wife own land jointly and reside in the same household, the exemption may be claimed by either or may be divided in any proportion between them, but in no event shall the exemption exceed $25,000./[1] In the original schedules each spouse claimed a $25,000 exemption, but the schedules were later amended so as to claim an exemption of $24,000 for the wife and $1,000 for the husband. Upon the sale of the farm it was agreed that their exemption claims would apply to the proceeds of the sale.

/[1]Section 272.20, Wis. Stats.

The Trustee filed his report of exempt property on January 19, 1976 setting aside a homestead exemption "not to exceed a total of $10,000 to be divided between husband and wife." He stated as his reason: "Trustee respectfully refuses and declines to set aside as exempt the homestead of the bankrupts in excess of $10,000 on the grounds that any allowance by the trustee in excess of $10,000 would be unconstitutional invasion of the contract rights vis-a-vis judgment creditors that existed at the time that the Wisconsin statutory allowance for homestead was limited to $10,000."

It is the trustee's position that the bankrupts cannot assert the $25,000 exemption against creditors who extended credit prior to the amendment of March 12, 1974. In support of his position he relies upon the general rule of constitutional law which holds that when a state statute is passed after a contract has been entered into, and the statute so affects the creditor's remedy as to impair substantially the value of the contract, the application of the statute to that contract violates Article 1, Section 10 of the U.S. Constitution. *Edwards v. Kearzey,* 96 U.S. 595 (1877); *W.B. Worthen Co. v. Thomas,* 292 U.S. 426 (1934). This rule was applied by the Wisconsin Supreme Court to preclude the application of an increased homestead exemption to an action arising out of a contract entered into when the exemption was only $5,000. *Ohio Casualty Ins. Co. v. Holz, Inc.,* 24 Wis. 2d 587.

Counsel for the bankrupts objected to the Exempt Property Report of the trustee on the grounds that the creditors did not rely upon the lower exemption of $10,000 when they extended credit, and upon further grounds that the creditors did not have lien rights prior to the amendment of the Statute. If the court were to consider only these objections raised by counsel for the bankrupts, the objections would be

overruled because there is no requirement in the constitutional rule that creditors have a judgment lien. The rule is based upon the impairment of contract and all that need be shown is that the debt was incurred prior to the amendment. *Campbell v. Michelson,* 227 Wis. 429; *W.B. Worthen Co. v. Thomas,* 292 U.S. 426 (1934).

The question presented is extremely important to the future administration of bankruptcy cases in Wisconsin and for that reason, the court feels compelled to consider other reasons not advanced in the briefs which go to the heart of the problem. The principal problem is whether a trustee in bankruptcy should examine the claims of creditors to determine if any of the creditors extended credit prior to the amendment of the homestead statute so that as to them the exemption would be only $10,000.

The basic direction to a trustee in bankruptcy may be found in Section 6 of the Bankruptcy Act, which provides in part:

> This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by *the State laws in force at the time of the filing of the petition* ... (Italics ours).

Rule 403 (b) requires that the trustee shall examine the bankrupt's claim for exemptions and set apart such as are lawfully claimed and allowable. This report is to be filed no later than 15 days after his appointment. If no objections are filed within 15 days, the report is deemed to be approved by the Court (Rule 403 (e)). It should be observed that the trustee must act very promptly and that he has only 15 days to set off the exemptions. It should be further noted that the exemptions are determined by the laws in force on the date of the filing of the petition. The problem here is

what should the trustee do if the exemptions in force at the time of the filing of the petition do not apply as to some creditors.

The leading case on the subject was decided many years ago by the U.S. Supreme Court in the case of *Lockwood v. Exchange Bank,* 190 U.S. 294 (1902). In that case one creditor held a "waiver note" which was recognized in Georgia as a valid waiver of a homestead exemption. The question presented was stated as follows:

> Has the bankruptcy court jurisdiction to protect or enforce against the bankrupt's exemption the rights of creditors not having a judgment or other lien, whose promissory notes or other like obligations to pay contain a written waiver of the homestead and exemption authorized and prescribed by the constitution of the State, or are such creditors to be remitted to the State courts for such relief as may be there obtained?

In answering this question the U.S. Surpeme Court laid down the rule of law which has been followed by bankruptcy courts since 1902. The Court held that the bankruptcy court has no jurisdiction to protect or enforce against the bankrupt's exemption, the rights of creditors who may have a written waiver of the homestead exemption. Such creditors must assert their rights in a state court and the bankruptcy court may withhold the discharge of the bankrupt for a reasonable time to give them an opportunity to do so. The U.S. Supreme Court went on to say:

> Though it be conceded that some inconvenience may arise from the construction which the text of the statute requires, the fact of such inconvenience would not justify us in disregarding both its letter and spirit. Besides,

> if mere arguments of inconvenience were to have weight, the fact cannot be overlooked that the contrary construction would produce a greater inconvenience. The difference, however, between the two is this, that in the latter case — that is, causing the exempt property to form a part of the bankruptcy assets — the incovenience would be irremediable, since it would compel the administration of the exempt property as part of the estate in bankruptcy, whilst in the other, the rights of creditors having no lien, as in the case at bar, not having a remedy under the state law against the exempt property, may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the State court of such proceedings as might be necessary to make effective the rights possessed by the creditor.

This rule has been criticized by some authors, but never overruled. For a discussion and critique see the following articles:

Collier, 14th Ed., 6.05
68 Yale Law Journal, 1459 reprinted in Vol. 33
Referees' Journal, 111 October 1959
1938 Wis. Law Review 510

The majority of the courts in construing the rights of a trustee in bankruptcy have concluded that since exempt property is not part of the bankrupt's assets, the bankruptcy court has no power to administer exempt property. More importantly, the Court of

Appeals for this circuit has several times cited and followed the *Lockwood* rule. One of the earliest cases to be considered by the Court of Appeals for the Seventh Circuit arose in this district. *In re: Lippow,* 92 F. (2d) 619. Although the case arose upon an objection to discharge for the failure of the bankrupt to itemize his wearing apparel and household furnishings in his bankruptcy schedules, the real question before the court was how to administer assets which were not exempt as to some creditors who had a claim for the unpaid purchase price./[1] In answering that question the Court of Appeals cited *Remington on Bankruptcy,* Vol. 3 (3rd Ed. 1923) p. 149 where it is stated:

> Nevertheless, the law is settled differently and seems to be, in brief, that the sole question to be determined by the bankruptcy court is whether or not the property is exempt against creditors in general. If it be so exempt, then it is to be set apart, and further administration of it refused, notwithstanding that, as to some creditors, it might not be exempt.

The soundness of this rule can best be illustrated by the problems which would arise in nearly every bankruptcy case in Wisconsin if the trustee were required to administer assets which are not exempt as to some creditors. For example, almost every bankrupt has clothing, furniture, a television set or other exempt property for which the purchase price has not been paid. The schedules may list numerous department stores or other creditors against whom the exemptions do not apply. Under today's modern credit card system such creditors would include companies who issue

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/[1]Under Section 272.18 (30) of the Wis. Stats. property is not exempt against a creditor who has a claim for the purchase price.

credit cards because such cards are often used to purchase items which would not be exempt because the purchase price has not been paid. Should the trustee be required to take possession and sell such items of clothing and furniture because they are not exempt as to some creditors? If the trustee were to follow the same rule which he applied in the instant cases, he would be required to refuse to set off as exempt any property for which the purchase price has not been paid because as to some creditors such property would not be exempt. Thus, in practically every bankruptcy case the trustee would be required to administer exempt property because as to some creditors it would not be exempt. The mere problem of determining which creditors have claims for the purchase price of exempt property would be a time-consuming task for the trustee. It would mean that he would be required to examine every creditor who has a possible claim for the purchase price of exempt property. Obviously such administration of exempt property in the bankruptcy courts was never intended by the Bankruptcy Act. Under the rule cited in the *Matter of Lippow,* supra, it is not necessary to consider such claims because the sole question to be determined is whether or not the property is exempt against creditors in general. If it be so exempt, it is to be set apart and further administration of it refused, notwithstanding that as to some creditors, it might not be exempt.

This rule was again followed by the Seventh Circuit Court of Appeals in the case of *In re Urban,* 136 F. (2d) 296, 298 where the court said:

> ... If creditors have claims against the exempt property the bankruptcy court is not open to litigate such rights. The bankruptcy court has only jurisdiction to set off the exemption to which a claim is made and to which the bankrupt is entitled. No interest in that

> property passes to the trustee, and the exempt property is no part of the assets of the bankrupt's estate subject to administration in the bankruptcy court. If the creditor has any rights against such property claimed and set off to the bankrupt as exempt, the courts of the State are the proper forum to litigate such claims. Lockwood v. Exchange Bank, 190 U.S. 294, 23 S.Ct. 751, 47 L.Ed. 1061; Stein v. Bostian, 8 Cir. 133 F. 2d 586, 589.

In *Stein v. Bostian,* 133 F. 2d 586, CA8 which was cited by our Court of Appeals, the court considered the same question and stated:

> If creditors of a bankrupt assert that property, while exempt generally, is not exempt from process to enforce their particular debts, they must resort to courts other than the court of bankruptcy to enforce payment out of such property. See Duffy v. Tegeler, CA8 19 F. 2d 305; Huckhill-Hunter Co. v. Oliver, CA3 43 F. 2d 100.

The rule established by the Seventh Circuit is consistent with other decisions of the U.S. Supreme Court which have dealt with the problem as to when the bankrupt's rights to exempt property are determined. One of the earliest decisions is found in *White v. Stump,* 266 U.S. 310 (1924). In the *White* case the bankrupt attempted to perfect a homestead exemption after he filed bankruptcy by filing a declaration required under Idaho law. Although the lower courts allowed the exemption, the Supreme Court reversed and stated:

> When the law speaks of property which is exempt and of rights to exemptions, it, of course, refers to some point of time. In our opinion this point of time is the one as of

> which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The provisions before cited show that *one common point of time is intended, and that is the date of the filing of the petition.* (Italics ours).

A more recent decision of the United States Supreme Court which deals with the time when the rights of a trustee in bankruptcy are ascertained is *Lewis v. Manufacturers National Bank,* 364 U.S. 603 (1961) where the Court stated:

> We think that one consistent theory underlines the several versions of Sec. 70 (c) which we have set forth viz, that the rights of creditors whether they are existing or hypothetical — to which the trustee succeeds are to be ascertained as of "the date of bankruptcy", not at an anterior point of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition of bankruptcy is filed ...

The Court is mindful of the decision by Bankruptcy Judge Bessman of the Western District of Wisconsin in the *Matter of Langley* No. 75-758 and No. 75-759 which was affirmed on January 4, 1976 (66,028 CCH.) this decision is based largely upon *England v. Sanderson,* 236 F. 2d 641 decided in the Ninth Circuit. It may be true that *England v. Sanderson,* supra, holds that a trustee in bankruptcy may assert the rights of pre-existing creditors with respect to an increase in the homestead exemption. However, the rule expressed in the *England* case is a minority rule, and the court finds it difficult to reconcile the decision with the rule expressed by the U.S. Supreme Court in

Lockwood v. Exchange Bank, supra and *Lewis v. Manufacturers National Bank,* supra. Furthermore, this court believes that the decision in *England v. Sanderson,* supra, is contrary to the better reasoned decisions in the Seventh Circuit which, of course, are binding on this court.

It is important to note that in *England v. Sanderson,* supra, the court relied upon and cited *Constance v. Harvey,* CA2 (1954) 215 F. 2d 571. The latter case may have been good authority in 1956 when *England v. Sanderson,* supra, was decided, but it is no longer sound authority because in 1961 the U.S. Supreme Court in *Lewis v. Manufacturers National Bank,* supra, reversed *Constance v. Harvey* with respect to the time when the rights of a trustee are ascertained when Mr. Justice Harlan in his concurring opinion stated:

> As the judge who wrote for the Court of Appeals in Constance v. Harvey, 215 F. 2d 571, I think it appropriate to say that I have long since come to the view that the second opinion in Constance, 215 F. 2d 575 was ill-considered. I welcome this opportunity to join in setting the matter right.

As stated above, the U.S. Supreme Court has clearly stated in *Lewis v. Manufacturers National Bank,* supra, that "the rights of creditors — whether they are existing or hypothetical — to which the trustee succeeds are to be ascertained as of the date of bankruptcy, not at an anterior period of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition of bankruptcy is filed." It is also stated in *Collier,* 14th Ed., Section 6.05 (2) at p. 810:

> The rule is now well settled that the bankruptcy court has no jurisdiction to enforce a lien *or*

> *claim* upon exempt property and that such matters must be litigated, usually in the state courts. (Italics ours).

In support of the rule expressed above, *Collier* cites *Matter of Vonhee* (D.C. Wash.), 238 Fed. 422 where the state statute allowed claims for wages as against exempt property. The Court in *Vonhee* said:

> The only question for the court to determine is whether, as against general creditors, the bankrupt's property is exempt. If it is exempt as against general creditors, the control exercised by the bankruptcy court is limited. Whether the property is subject to equities, liens or judgments of individual or special creditors is not the concern of the bankruptcy court, and when special claims are made which take away the right of exemption as to them, the state court is the proper forum in which to proceed for the enforcement of such claims.

In support of this general rule, Collier cites numerous cases in Footnote 14 including cases in the Seventh Circuit. It is noted that *England v. Sanderson* C.A. 9, 236 F. 2d 641 is cited as being contrary or distinguishable from the general rule.

The *Langley* decision in the Western District of Wisconsin rests to a large extent upon a decision by the Wisconsin Supreme Court in the case of *Ohio Casualty Co. v. Holz & Holz, Inc.,* 24 Wis. (2d) 587. It is there stated that the Referee in Bankruptcy "erroneously determined the amount of the exemption" when he allowed a $10,000 homestead exemption instead of $5000. However, it must be noted that the only case cited by the Wisconsin Supreme Court in support of that statement is *England v. Sanderson, supra,* from the Ninth Circuit. As pointed out above,

the rule in *England v. Sanderson,* supra, is a minority rule and appears to be contrary to decisions in our own Seventh Circuit. If the cases in the Seventh Circuit had been called to the attention of the Wisconsin Supreme Court, the statement with respect to the action of the Referee in Bankruptcy might well have been different. Actually, this court has no quarrel with the decision of the Wisconsin Supreme Court in *Ohio Casualty Ins. Co.,* supra. It should be pointed out however that a trustee in bankruptcy, or the rights of such trustee were not involved in the case. It was simply an action between several individuals to determine their rights to a homestead exemption under the Wisconsin Statutes. The decision has no application to the question now before this bankruptcy court, and we submit that any reference to the erroneous determination of a bankruptcy referee in another case is merely dicta.

It should be further noted that the trustee's actions in the Zahn cases now before this court are similar to the erroneous ruling made by the Referee in bankruptcy in *Lockwood v. Exchange Bank,* supra. In *Lockwood* the trustee made the correct decision when he set off the homestead exemption but a creditor holding a waiver note filed an objection. The Referee then reversed the trustee's actions and ruled in the same manner as the trustee would have the court rule in the instance case, and held that part of the exempt property should be administered for the benefit of creditors holding waiver notes. The Referee's decision was affirmed below, but in reversing the lower court the U.S. Supreme Court stated:

> We think that the terms of the Bankruptcy Act of 1898 ... clearly evidence of the intention of Congress that the title to the property of a bankrupt generally exempted by State laws

> should remain in the bankrupt and not pass to his representative in bankruptcy.

This decision has never been reversed, and must be considered the leading authority today.

A difficult problem here is that the trustee claims that only one creditor out of a total of 38 creditors extended credit after the homestead amendment, and that 37 creditors were pre-existing creditors. When the trustee attempted to prove these facts at the trial, the court rules that such evidence was immaterial. However, so that the record is available, the trustee was allowed to submit proof as to the date when each debt arose. In the opinion of the court this evidence merely proves the well-known rule that "hard cases make bad law." There may be only one creditor who will receive a windfall in this case, but in the future we may have cases where most of the creditors extended credit after the homestead amendment. What should the trustee do in such cases? We submit that he can avoid this problem by simply following the rule established in this Circuit in *Lippow* and *Urban.* He should set off the exemptions which are in force at the time the petition is filed. If any creditors have claims that as to them a lower exemption would apply the proper forum for establishing such claims as in the State courts as stated in *Lockwood v. Exchange Bank,* supra.

It should be mentioned that a proposed bill may soon be introduced in the Wisconsin Legislature to increase many of the outmoded exemptions which were enacted in the 19th Century. For example, the $200 exemption for household furniture in Section 272.18 (5) of the Statutes is clearly inadequate under today's standards of value. What if the legislature increases the household furniture exemption? Should the trustee be required to examine the schedules in every case to

determine which creditors are pre-existing creditors? Under the *England v. Sanderson,* supra, rule he would be required to set off as exempt only $200 worth of household furniture and sell the remainder for the benefit of pre-existing creditors. This hypothetical situation illustrates the wisdom of the Seventh Circuit rule expressed in *Lippow.* Under the *Lippow* rule the trustee will not be concerned with the rights of pre-existing creditors. He will simply set off the exemptions which apply to creditors generally on the date of bankruptcy, and those creditors who claim some special right to exempt property must assert their rights in the state courts.

For the reasons stated this court holds that the duty of a trustee in bankruptcy is to set off the exemptions which exist as to creditors generally on the day of filing bankruptcy. The trustee should not be concerned with the rights of creditors who may have liens or special claims against exempt property. Such creditors may foreclose their liens against exempt property in the state courts, or if they do not have liens but merely claim that the exemption does not apply as to them, they may then apply to the bankruptcy court for relief from the automatic stay provided in Rule 401 so thathat they can proceed in the state courts against the exempt property. Although it may be more convenient for the bankruptcy court to adjudicate the rights of all parties to exempt property, convenience is not sufficient reason to ignore the rule of the U.S. Supreme Court as expressed in *Lockwood v. Exchange Bank,* 190 U.S. 294 (1902). In the instant case the trustee is directed to allow a homestead exemption of $25,000 which is to be divided between the husband and wife in such manner as they direct. Since no creditors have requested permission to proceed in the state courts, and since a discharge of all debts has

already been granted/[1] to the bankrupts, creditors who do not hold a valid lien against the exempt homestead are not in a position to make any claim against the proceeds.

This decision shall constitute the findings of fact and conclusions of law by the court. The attorney for the trustee is requested to submit an appropriate order.

Dated at Milwaukee, Wisconsin, January 10, 1977.

/s/ Howard W. Hilgendorf
Howard W. Hilgendorf
Bankruptcy Judge

/[1]The discharge was granted to both husband and wife on February 5, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IN THE MATTER OF	IN BANKRUPTCY
KURT W. ZAHN, a/k/a KURT WALTER ZAHN, a/k/a/ CURT ZAHN, a/k/a KURT A. ZAHN,	No. 75-B-2620
ANNA ZAHN, a/k/a ANN ZAHN,	No. 75-B-2621
Bankrupts.	

This is an appeal from a decision of the bankruptcy court. Kurt W. Zahn and his wife, Anna Zahn, filed a voluntary petition in bankruptcy on November 20, 1975. They owned a farm valued at $141,000 which was their homestead, and which the trustee in bankruptcy sold free and clear of liens for an amount in excess of $25,000. The bankrupts claimed a homestead exemption in the amount of $25,000 pursuant to Section 272.20, Wis. Stats. (1974).[1] That statute had been amended effective March 12, 1974, to increase the homestead exemption from $10,000 to $25,000. The trustee in his report of exempt property allowed a homestead exemption of no more than $10,000, for the reason that all of the bankrupts' debts, with one exception, were contracted prior to March 12, 1974, and therefore that to allow an exemption of more than $10,000 would be unconstitutional invasion of the

[1]Section 272.20 was renumbered by Supreme Court Order effective January 1, 1976, to Section 815.20. See 67 Wis. 2d 761 (1975).

contract rights vis-a-vis judgment creditors that existed at the time that the Wisconsin statutory allowance for homestead was limited to $10,000.

On objection of the bankrupts to the trustee's exempt property report, the bankruptcy court, the Honorable Howard W. Hilgendorf presiding, held that the bankrupts were entitled to a homestead exemption in the amount of $25,000, which was the exemption in effect on the date that their petition in bankruptcy was filed. The decision is affirmed. The court cannot improve on the decision of the bankruptcy court, entered January 10, 1977, and therefore adopts that decision as its own, which is attached as an appendix to this decision, but this court will add the following comments./[2]

The trustee argues on appeal primarily (1) that pursuant to 11 U.S.C., Section 110, on the date the petition in bankruptcy is filed he is vested with the

[2]Also raised on appeal is the issue of whether or not the homestead property was held in true joint tenancy. Section 272.20 (1) provides that the homestead exemption:

> "*** extends to land owned by husband and wife jointly or in common, and when they reside in the same household may be claimed by either or may be divided in any proportion between them, ***."

Since the court affirms the decision below, it need not decide the proper manner of distribution of the portion of the homestead allowance ($15,000) presently being held by the trustee, and therefore need not decide if the homestead property was held in true joint tenancy or in common.

rights of the bankrupts' actual creditors, and not merely with the rights of a hypothetical creditor as of the date of the filing; and (2) that as to the actual creditors, with one exception, the homestead property in excess of the amount of $10,000 was not exempt property on the date the petition was filed because under state law the increased exemption was ineffective.

Section 272.20, Wis. Stats. (1974), does not require the owner of an exempt homestead to perform any particular actions in the nature of filings or recordings to perfect his homestead exemption. Compare *White, Trustee of the Estate of Pete Stump, Bankrupt v. Stump,* 266 U.S. 310 (1924), with *Myers, Trustee v. Matley,* 318 U.S. 622 (1943). It is sufficient if the homestead property is "selected by a resident owner and occupied by him." Section 272.20 (1). Thus the increase in the homestead exemption occurred automatically on the effective date of the statute and applied against all creditors whose interests arose after that date. As to pre-existing creditors, however, the increase does not apply. See *Ohio Casualty Insurance Company v. Holz & Holz, Inc.* 24 Wis. 2d 587, 129 N.W. 2d 330 (1964).

It is the law in this circuit that the bankruptcy trustee stands in the position of a general creditor as of the date that the petition in bankruptcy is filed, and therefore that the duty of the bankruptcy court is to determine whether or not property is exempt against creditors in general as of that date, "'*** notwithstanding that, as to some (actual) creditors, it might not be exempt.'" *In Re Lippow,* 92 F. 2d 619, 621 (7th Cir. 1937), citing Remington on Bankruptcy, Volume 3 (3d Ed. 1923) at 149. See also *Stern v. Bostian,* 133 F. 2d 586 (8th Cir. 1943); *Lewis, Trustee in Bankruptcy v. Manufacturers National Bank of Detroit,* 364 U.S. 603

(1961). Thus the trustee in this case stands in the position of a general creditor whose claim arose on November 20, 1975, the date the petition was filed, and as to such creditor, under the law of the State of Wisconsin, the $25,000 homestead exemption is valid. Section 272.20, Wis. Stats. (1974). The bankruptcy court therefore properly held that the property was "exempt" within the meaning of 11 U.S.C., Section 110. The trustee has conceded that property which is exempt is not within the administration of the bankruptcy court.

The judgment is affirmed.

Dated at Milwaukee, Wisconsin, this 23rd day of June, 1978.

/s/ John W. Reynolds, Chief Judge
John W. Reynolds

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 78-2014

In The Matter of KURT W. ZAHN
a/k/a KURT WALTER ZAHN a/k/a CURT ZAHN
a/k/a
KURT A. ZAHN, ANNA ZAHN
a/k/a ANN ZAHN,
Bankrupts,

ROBERT BRAMSHER, Trustee in Bankruptcy,
Appellant,

KURT W. ZAHN a/k/a
KURT WALTER ZAHN a/k/a
KURT A. ZAHN,
Appellees.

Appeal from the United States
District Court for the Eastern
District of Wisconsin.
Nos. 75-B-2620, 75-B-2621-
JOHN W. REYNOLDS, Judge.

HEARD JANUARY 26, 1979 —
DECIDED AUGUST 20, 1979

BEFORE PELL and TONE, Circuit Judges, and LEIGHTON, District Judge.*

---

*District Judge George N. Leighton of the Northern District of Illinois sitting by designation.

PER CURIAM. This is an appeal by a trustee in bankruptcy from an order by which the district court adopted the decision of a bankruptcy judge as its own, and then resolved additional issues. We agree with the district court, including its adoption of the decision which in the district judge's opinion, and ours as well, correctly articulated the applicable law. That decision is reported *In the Matters of Kurt W. Zahn and Anna Zahn, bankrupts,* 2 Bankruptcy Court Decisions 1609 (E.D. Wis. 1977) and is attached hereto as an Appendix.

From the record of the bankruptcy court, it appears that appellees Kurt W. Zahn, and his wife, Anna, filed a voluntary petition in Bankruptcy on November 20, 1975. They owned a farm, their homestead, valued at $141,000 which appellant trustee sold free and clear of liens for an amount in excess of $25,000. All of their debts, with one exception, were contracted prior to March 12, 1974, the effective date of Wis. Stat. Section 272.20 (1974) which increased homestead exemption in Wisconsin from $10,000 to $25,000.

In his report of exempt property, appellant refused to set aside more than $10,000 as exempt homestead for appellees, contending that to do so would have unconstitutionally invaded the contract rights of persons who were appellees' creditors when the statutory limit was $10,000. The bankruptcy judge sustained appellees' objections to appellants' report and directed that $25,000 be set aside as exempt homestead, the amount allowed by Wis. Stat. Section 272.20 (1974). He held that the duty of a trustee is to set off the exemptions which exist as to creditors generally on the day a petition in bankruptcy is filed; and that creditors with liens or special claims against the exempt property can seek their remedy in the state court. The district court accepted this ruling and

rejected appellant's remaining arguments. The order appealed from is affirmed.

APPENDIX

The Seventh Circuit Court of Appeals adopted Judge Hilgendorf's decision and set forth same as an appendix to its decision, and the petitioner does not include the same by reason of the fact that it has already been included as the first decision under this appendix A and respectfully refers the Court thereto.

Per Curiam Opinion

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 20, 1979

Before

HON. WILBUR F. PELL, JR., Circuit Judge

HON. PHILIP W. TONE, Circuit Judge

HON. GEORGE N. LEIGHTON, District Judge*

No. 78-2014	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, No. 75-B-2620 JOHN W. REYNOLDS, Judge
In The Matters of: KURT W. ZAHN, etc., and ANNA ZAHN, etc., Bankrupts.	
Appeal of: ROBERT G. BRAMSCHER, Trustee in Bankruptcy.	

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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*District Judge George N. Leighton of the Northern District of Illinois sitting by designation.

APPENDIX B

APPENDIX B

CONSTITUTION OF THE UNITED STATES

ARTICLE I

"Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title or Nobility.

* * *"

WISCONSIN STATUTES

Wisconsin Homestead Exemption as it appeared prior to March 12, 1974:

"272.20 Homestead exemption definition. (1) An exempt homestead as defined in Section 990.01 (14) selected by a resident owner and occupied by him shall be exempt from execution, from the lien of every judgment and from liability for the debts of such owner to the amount of $10,000.00, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. Such exemption shall not be impaired by temporary removal with the intention to reoccupy the premises as a homestead nor by the sale thereof, but shall extend to the proceeds derived from such sale to an amount not exceeding $10,000, while held, with the intention to procure another homestead therewith, for 2 years. Such exemp-

tions extend to land owned by husband and wife jointly or in common, and when they reside in the same household may be claimed by either or may be divided in any proportion between them, but in no event shall the exemption exceed $10,000 for such household. In the event the husband and wife fail to agree on the division of exemption, the exemption shall be divided between them by the court in which the first judgment was taken. Such exemption extends to the interest therein of tenants in common, having a homestead thereon with the consent of the co-tenants, and to any estate less than a fee."

(2) * * *

Wisconsin Homestead Exemption subsequent to March 12, 1974: (now renumbered Section 815.20):

"272.20 Homestead exemption definition. (1) An exempt homestead as defined in Section 990.01 (14) selected by a resident owner and occupied by him shall be exempt from execution, from the lien of every judgment and from liability for the debts of such owner to the amount of $25,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. Such exemption shall not be impaired by temporary removal with the intention to re-occupy the premises as a homestead nor by the sale thereof, but shall extend to the proceeds derived from such sale to an amount not exceeding $25,000, while held, with the intention to procure another homestead therewith, for 2 years. Such exemption extends to land owned by husband and wife jointly or in common, and when they reside in the same

household may be claimed by either or may be divided in any proportion between them, but in no event shall the exemption exceed $25,000 for such household. In the event the husband and wife fail to agree on the division of exemption, the exemption shall be divided between them by the court in which the first judgment was taken. Such exemption extends to the interest therein of tenants in common, having a homestead thereon with the consent of the co-tenants, and to any estate less than a fee."

(2) * * *

NATIONAL BANKRUPTCY ACT

"Section 6. Exemptions of Bankrupts. This Act shall not affect the allowance to the bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State:
Provided, however, ***"

(11 U.S.C. Section 24)

"Section 47. Duties of Trustees. A. Trustees shall (1) - (5) ***"

"(6) set apart the bankrupts' exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; (7) - (14) ***"

(11 U.S.C. Section 75)

"Section 70. Title to Property. A. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) - (4) ***

(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* ***"

b. ***

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property whether or not coming into possession or

control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. ***"

(d) - (i) ***

(11 U.S.C. Section 110)

RULES OF BANKRUPTCY PROCEDURE

RULE 403

EXEMPTIONS

"(a) *Claim of Exemptions.* A bankrupt shall claim his exemptions in the schedule of his property required to be filed by Rule 108.

(b) *Trustee's Report.* The trustee shall examine the bankrupt's claim for exemptions set apart such as are lawfully claimed and allowable, and report to the court the items set apart, the amount or estimated value of each, and the exemptions claimed that are not allowable. The report shall be filed with the court no later than 15 days after the trustee qualifies. If the trustee reports that any exemption claimed is not allowable, he shall forthwith mail or deliver copies of the report to the bankrupt and his attorney.

(c) *Objections to Report.* Any creditor or the bankrupt may file objections to the report within 15 days after its filing, unless further time is granted by the court within such 15-day period. Copies of the objections so filed shall be delivered or mailed to the trustee and, if the objections are by a creditor, to the bankrupt and his attorney. After hearing upon notice the court shall determine the issues

presented by the objections. The burden of proof shall be on the objector."

(d) - (f) ***

Supreme Court, U. S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-846

Robert Bramscher, Trustee in
Bankruptcy of Kurt W. Zahn
a/k/a Kurt Walter Zahn
a/k/a Curt Zahn a/k/a Kurt A. Zahn and
Anna Zahn a/k/a Ann Zahn,
Petitioner,

vs.

Kurt W. Zahn a/k/a Kurt
Walter Zahn a/k/a Curt Zahn
a/k/a Kurt A. Zahn and
Anna Zahn a/k/a Ann Zahn,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Kurt W. Zahn a/k/a Kurt
Walter Zahn a/k/a Curt Zahn
a/k/a Kurt A. Zahn and
Anna Zahn a/k/a Ann Zahn,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Kurt W. Zahn a/k/a Kurt Walter Zahn a/k/a Curt Zahn a/k/a Kurt A. Zahn and Anna Zahn a/k/a Ann Zahn, the respondents herein, by and through their counsel, Henry A. Sibbing, pray that the Writ of Certiorari not issue.

OPINIONS BELOW

This case, as properly stated by the petitioner, began on the 20th day of November, 1975, at which time Kurt W. Zahn and Anna Zahn filed their petitions for bankruptcy.

The Bankruptcy Judge, the Honorable Howard W. Hilgendorf, rendered an opinion on the issue of the amount of the Homestead Exemption to be set aside by the Trustee. The amount was determined to be $25,000, the Homestead Exemption in effect at the time of the filing of the bankrupts' petition.

This decision was affirmed on the 23rd day of June, 1978, by the Honorable John W. Reynolds, Chief Judge of the United States District Court — Eastern District of Wisconsin. In the opinion Judge Reynolds stated, "The court cannot improve on the decision of the bankruptcy court, entered January 10, 1977, and therefore adopts that decision as its own, ...". Judge Reynolds' opinion is included in the Trustee's Petition For A Writ Of Certiorari, page 16a.

The Seventh Circuit Court of Appeals affirmed the District Court decision on August 20th, 1979, adopting the District Court decision as its own.

REASONS FOR REFUSAL TO GRANT THE WRIT OF CERTIORARI

It is contended by the Trustee that there is a Constitutional issue involved, to-wit, that by allowing the $25,000 exemption to apply to the bankrupts it would, in effect, be denying creditors their rights under Article I, Section 10, of the United States Constitution, wherein "no State shall ... pass any Law impairing the Obligation of Contracts, ...".

Further, the Trustee states in his petition that there is a conflict among the circuits on this issue and cites the case of *England vs. Sanderson* (9th Cir., 236 F. 2d 641).

The bankrupts argue that by allowing the increased exemption of $25,000, the Court is not only following the mandate of Section 6 of the National Bankruptcy Act which specifically states that, "This Act shall not affect the allowance to the bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition ...", but also, as a practical matter, is not violating creditors' rights or debtors' obligations under a contract where the amount of the Homestead Exemption is not, in fact, relied upon in extending such credit and where such exemption is known by the creditors to be subject to change from time to time by the legislature.

There does not appear to be a conflict between the 9th Circuit and the 7th Circuit on this issue if the opinion of Judge Hilgendorf, the Bankruptcy Court Judge, is carefully read. As Judge Hilgendorf points out, the case of *England vs. Sanderson* (supra) relied heavily upon *Constance vs. Harvey,* CA2 (1954) 215 F. 2d 571, which in fact was subsequently reversed in 1961 by the United States Supreme Court in *Lewis vs. Manufacturers National Bank,* 364 U.S. 603 (1961).

Furthermore, the *England vs. Sanderson* case (supra), which the Trustee cites as authority for the proposition that there is a conflict among the various circuit courts, was very severely criticized in 1956 in the case of *In The Matter Of Melvin J. Towers,* 146 F. Supp. 882. In this case the California District Court, in an opinion written by the Honorable Judge Halbert, states in footnote 2, page 885, his sincere misgivings as to the wisdom of the decision in *England vs. Sanderson* (supra). Judge Halbert states as follows in the above-mentioned footnote: "Even though I am obliged, just as the Court of Appeals of this Circuit was obliged, to follow the rule laid down in *In re Rauer's Collection Co.,* 87 Cal. App. 2d 248, 196 P. 2d 803, I feel constrained to observe that I do not approve the rule, and I do not understand the reasoning by which the Court in that case reached the conclusion that an increase in the amount of a homestead exemption can only apply to obligations incurred after the date on which the statute authorizing the increase became law. In laying down this rule, they do violence to the fundamental concept underlying the benign object of the homestead statute as it is laid down in *Re Estate of Fath,* 132 Cal. 609, at page 613, 64 P. 995, 997. It is there said: 'The object of all homestead legislation is to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or *from the importunity of their creditors.*' (Emphasis added.)"

CONCLUSION

In conclusion, therefore, the respondents respectively request the Court to deny the Petition For A Writ Of Certiorari on the following grounds:

There is not a violation of creditors' 6th Amendment rights inasmuch as the Bankruptcy Act is designed to afford the bankrupt the opportunity to discharge his contractual debts and further provides that the bankrupt is entitled to claim as exempt that property which is deemed exempt at the time of the filing of the petition of bankruptcy under applicable State law. In this instance, the Wisconsin Homestead Exemption, Wisconsin Statute 272.20, in effect on March 12, 1974, provided for a $25,000 exemption.

The Judge in bankruptcy, the District Court and the Seventh Circuit Court of Appeals have, therefore, all ruled correctly in this matter in allowing the bankrupts the exemption in the amount in effect on the day of the filing of the original petition in bankruptcy.

Respectfully submitted,

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